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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 1145

DENDY ROBERT SLIGH, *Petitioner,*

VERSUS

COLUMBIA, NEWBERRY AND LAURENS RAILROAD COMPANY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioner, Dendy Robert Sligh, prays that a writ of certiorari issue to review a judgment of the Court of Appeals for the Fourth Circuit decided December 23, 1966.

OPINIONS BELOW

The opinion of the District Court is reported at 250 F. Supp. 490 and is printed in the Appendix at pages 9 to 14. The opinion of the Court of Appeals of the Fourth Circuit, No. 10651, is printed in the Appendix at pages 15 and 16.

JURISDICTION

The judgment sought to be reviewed was decided December 23, 1966, and jurisdiction of this Court to review such judgment by writ of certiorari is conferred by 28 USC § 1254 (1) p. 5958 (1964). This Petition is sought pursuant to Chapter 4 of the Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Did the Fourth Circuit Court of Appeals improperly interpret the Federal Employers' Liability Act in affirming the District Judge's findings (1) that there was no employer negligence in moving the defendant's railroad motor car with four employees at the time and under the circumstances involved and in failing to assign plaintiff lighter duties; (2) in finding there was no injury or injuries sustained by the plaintiff; and (3) in refusing cross-examination of a witness whose testimony differed from his deposition?

2. Were the findings of fact and conclusions of law of the District Judge against the great weight of the evidence and clearly erroneous in contemplation of the Provisions and Purposes of the Federal Employers' Liability Act.

STATUTES INVOLVED

45 USC § 51, p. 8520 (1964):

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin; dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Rule 43 (b) 28 USC, Appendix p. 6120 (1964) Rules of Civil Procedure:

"SCOPE OF EXAMINATION AND CROSS-EXAMINATION. A Party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or

of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief."

RULE 26 (d) (1) 28 USC, Appendix p. 6167 (1964) Rules of Civil Procedure:

"Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness."

STATEMENT OF CASE

Plaintiff was a laborer for the defendant railroad with 30 years' experience. On February 7, 1964, his crew was putting in a track across a city street and commenced work one hour earlier than usual. At the close of the day, plaintiff and three other employees were ordered to remove a 2,400 lb. motor car from the railroad tracks. One of the men so designated weighed no more than 155 lbs. and was not in good health, retiring within the year. There were at least eight men available at this time, and the other men moving the motor car were unaccustomed to working with the plaintiff. Plaintiff complained of pains in his back and legs on the journey to his home in defendant's truck, and sought the assistance of a doctor the following morning. He was out of work for one week with a back sprain. On his return to work he was assigned to the most arduous tasks then facing the laborers. His back broke down again, and he was treated intermittently by a general practitioner, and an orthopedic surgeon until the ortheopedic surgeon decided it would be necessary to fuse his spine in order to obtain any relief. Plaintiff is now totally and permanently disabled from engaging in manual labor in the future. The action was originally brought in the United States District Court under the Provisions of the Federal Employers' Lia-

bility Act, conferring jurisdiction upon the District Courts in actions for damages arising out of injuries to employees of railroads engaging in Interstate Commerce.

ARGUMENT

This Petition for a review on writ of certiorari is sought upon the basis that the District Court erred in its findings of fact and conclusions of law and that the Court of Appeals failed to correct such error in its opinion affirming such decision. The District Judge in his Opinion found that there was no negligence, that the Plaintiff was contributorily negligent, that the Plaintiff had suffered no injury, and that the Plaintiff's injuries were not a result of any negligence of the railroad. Plaintiff submits that these findings, and the affirmation by the Court of Appeals, are in conflict with the decisions of this Court in the case of *James C. Rogers v. Missouri Pacific Railroad Co.*, 352 US 500, 77 S. Ct. 443, 1 L.Ed. 2d 493; *Frank E. Meeks v. Georgia, Southern & Florida Railway Co.*, 377 U.S. 405, 84 S.Ct. 1628, 12 L.Ed. 2d 495, and *Blair v. Baltimore & Ohio Railroad Company*, 232 U.S. 600, 65 S.Ct. 545, 89 L.Ed. 490. The *Meeks case, supra,* was an action on a writ of certiorari, reviewing and overruling a decision of the Supreme Court of the State of Georgia that an employee was guilty of contributory negligence. In the present case, the District Judge misconstrued the negligence Provisions of the Federal Employers' Liability Act and the decision of this Court in *Rogers v. Missouri Pacific, supra,* that the slightest negligence of the employer is sufficient to sustain an award for damages if such plays any part, however small, in the injury or death complained of. Here, the District Judge found that the Plaintiff "knew his own strength", thereby implying that he exerted too much strength. Yet, he finds that there was no employer neglegence, which finding is, obviously, contradictory. Not only was the defendant railroad negligent in placing four men to move a heavy car, but the supervisors were likewise negligent in assigning such heavy work to the plaintiff immediately

upon his return after the initial injury, thereby aggravating the first injury and necessitating the spinal fusion.

Again, the District Judge found that there was no injury to the plaintiff, despite all of the testimony concerning the obvious condition of the plaintiff and the observations of the other employees as to his physical condition and voiced complaints. While it is true that the District Judge sitting without a jury may "sift" the testimony and accept that which has the greater truth in the case of a conflict, here there is no conflict as to plaintiff's injury and complaints. Both witnesses for the plaintiff and for the defendant testified as to his condition, and as to their observations. Witnesses for the defendant merely testified that they failed to observe any indication of injury.

In view of the testimony as to the heavy weight, the lack of necessary employees, the physical condition of one of the employees, the extremely heavy work assigned to the plaintiff, the observations of his distress, and the resulting disability, confinement, and spinal fusion, the plaintiff submits that the District Judge was clearly erroneous in his findings; both of fact and of the law, and that the Circuit Court was in conflict with and made a significant departure from the decisions of the Supreme Court in affirming such findings.

CONCLUSION

It is, therefore, respectfully submitted that the decision of the District Court was clearly erroneous, that the Circuit Court has decided a Federal question in conflict with the applicable decisions of this Court, and that the writ of certiorari to review should be granted.

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APPENDIX